

**MORAGA  
GEOLOGIC HAZARD ABATEMENT DISTRICT (GHAD)**

**February 3, 2021  
MINUTES**

**6:00 p.m. Special Meeting**

**TELECONFERENCED MEETING LOCATION ONLY**

**\* COVID-19 NOTICE \***

**THIS MEETING WAS CONDUCTED PURSUANT TO THE PROVISIONS OF THE GOVERNOR'S EXECUTIVE ORDERS N-25-20 AND N-29-20, WHICH SUSPENDED CERTAIN REQUIREMENTS OF THE BROWN ACT, AND PURSUANT TO THE SHELTER IN PLACE ORDERS OF THE HEALTH OFFICER OF CONTRA COSTA COUNTY, INCLUDING THE MOST RECENT ORDER DATED JANUARY 25, 2021, AND OTHER SUBSEQUENT ORDERS, WHICH PERMITTED THE GHAD TO CONDUCT ESSENTIAL BUSINESS UNDER THE ORDER AS AN ESSENTIAL GOVERNMENTAL FUNCTION**

**Consistent with Executive Orders Nos. N-25-20 and N-29-20 from Governor Gavin Newsom and the Contra Costa County Health Officer Shelter in Place Orders including the most recent Order dated January 25, 2021, the February 3, 2021 GHAD meeting was not physically open to the public.**

***All GHAD Boardmembers and Town staff participated in this meeting via teleconference.  
(Zoom webinar)***

**1. CALL TO ORDER**

The special meeting was called to order at 6:07 p.m. by **Chair Mike McCluer**.

**ROLL CALL**

Boardmembers present: Chair Mike McCluer, Vice Chair Steve Woehleke and Boardmembers Teresa Onoda, Renata Sos, and David Stromberg

Boardmembers absent: None

**2. PUBLIC COMMENTS AND SUGGESTIONS**

Moraga Geologic Hazard Abatement District (GHAD) Clerk, Marty McInturf, reported no comments had been received for this item.

**3. ADOPTION OF MEETING AGENDA**

**PUBLIC COMMENTS OPENED**

Ms. McInturf reported no comments had been received for this item.

**PUBLIC COMMENTS CLOSED**

**ACTION: It was M/S (Onoda/Stromberg) to adopt the meeting agenda as presented. Roll Call Vote: 5-0.**

**4. ADOPTION OF CONSENT AGENDA**

**A. Approval of Consent Items**

**PUBLIC COMMENTS OPENED**

Ms. McInturf reported no comments had been received for this item.

**PUBLIC COMMENTS CLOSED**

**ACTION: It was M/S (Woehleke/Sos) to approve Consent Agenda Item 1, as submitted. Roll Call Vote: 3-0-2. Abstain: Onoda, Stromberg**

- |    |  |          |
|----|--|----------|
| 1. | Approve <u>Minutes</u> for the Moraga GHAD Meeting on December 9, 2020 | Approved |
|----|--|----------|

**B. Consideration of Consent Item(s) Removed for Discussion**

No items were removed from the Consent Agenda.

**5. REQUESTS FOR ACTION AND OTHER BUSINESS**

**A. GHAD Survey**

Receive and Discuss the Geologic Hazard Abatement District (GHAD) Survey on GHAD Management Structures

Town Manager Cynthia Battenberg reported the Public Works Director/Town Engineer and the Senior Civil Engineer had completed a survey of Geologic Hazard Abatement District (GHAD) Management Structures as requested by the GHAD Board of Directors. While her personal preference was that the GHAD responsibilities be handled by anyone other than Town staff given its resource constraints, having seen how the GHAD business had been handled over the past few months through the Town it was apparent Town staff had the structure, procedure, and skills to manage the GHAD in-house and there may be benefits to the community in doing so.

Senior Civil Engineer Bret Swain provided a PowerPoint presentation of the Moraga GHAD Structure. At the request of the GHAD Board, a survey had been prepared with the GHAD management structures and related issues to be discussed as identified in the survey. The makeup of GHAD Boards were identified consisting of either the City/Town Council, Board of Supervisors, or property owners elected from within the district. The GHAD Management options included utilizing municipal staff, contracting management out to consultants, or a hybrid of municipal and consultant staff. For the Town of Moraga, a consultant filled the dual roles for the Moraga GHAD with ENGEO the consultant for developer SummerHill Homes, serving as the GHAD Consultant and the GHAD Manager.

For the GHAD Management and Operational Survey, ten public agencies in Northern California had been contacted, and completed and returned the survey to Town staff. Of the ten municipal agencies surveyed either the City/Town Council or the County Board functioned as the GHAD Board and the breakdown of whether the GHAD was managed by the City/Town Manager or County Administrator, City/County Engineer or Public Works Director or a consultant were identified including those that used technical support as part of a hybridized system.

The GHAD Officer structure, GHAD Management, GHAD Clerk, legal and other services; GHAD management policies and practices; conflicts between municipalities and GHADs; issues arising in the GHAD Plan of Control; and the summary of findings based on the survey were all highlighted.

Responding to the GHAD Board, Town Manager Battenberg, Mr. Swain, Public Works Director/Town Engineer Shawn Knapp, GHAD Attorney Michael Colantuono Colantuono, Highsmith & Whatley, PC, and GHAD Manager Eric Harrell, ENGEEO, provided clarification, as follows:

- ENGEEO had been appointed as the GHAD Manager originally but there had been no contract to effectuate it. There had been little involvement with the Moraga GHAD since it had been formed in 2015, but with the completion of the Bellavista project it would be annexed into the GHAD and there would be work to do, which was why the GHAD Board had approved a contract for legal services with Colantuono, Highsmith & Whatley, PC as the GHAD Attorney. The GHAD Board had previously approved an 18-month agreement for the provision for Town Clerk services which allowed special projects, to run through June 30, 2021. The GHAD Treasurer had also been appointed and both the GHAD Treasurer and GHAD Attorney were present via Zoom.
- The duties of the GHAD Manager were detailed and would function similarly to the City/Town Manager, Public Works Director and staff. Moraga had a number of Civil Engineers who were able to do a lot of the engineering work related to the GHAD until there were special needs that exceeded staff's capacity.
- GHAD documents and responses to public records requests were the responsibility of the Town Clerk. As part of prior discussions, it had been envisioned that all services would be contracted out but when the GHAD Board had considered legal services, the GHAD Board hoped to retain a legal firm that would have provided both legal and clerk services; however, no legal firm had been interested in also providing clerk services and it made sense at this time for the Town to provide the clerk services. As shown in the results of the GHAD survey, staff found that the clerk in all municipalities had provided the clerk services.
- Examples of how some other GHAD Boards in the State had handled their Public Record Act requests were provided; legal counsel provided an overview of the purpose of the GHAD; addressed potential liability concerns; and suggested that the Town providing clerk services would not create a meaningful risk.
- Contracts provided but yet to be adopted included scope of work services/duties for each of the positions the GHAD Board was considering including the GHAD Manager, GHAD Engineer, GHAD Treasurer, and the like. True job descriptions were not typically seen unless a description for a full-time employee of a public agency, which did not apply in this case.
- Colantuono, Highsmith & Whatley, PC currently served three GHADs in California including the Town of Moraga GHAD, Broad Beach GHAD where ENGEEO had a role but was not the GHAD Manager or Project Clerk, and Santiago GHAD where the firm had a small role and ENGEEO had the management role. The firm also represented the City of Lathrop where ENGEEO had a relationship but not in any of the GHADs. In Lathrop the GHADs were wholly owned subsidiaries of the developer.
- The GHAD adopted Plan of Control described what it would do and included a specified monitoring program for V-ditches, storm drains, detention basins, retaining walls and

slopes. Since the GHAD would also own land, as part of scheduled maintenance it would conduct all weed abatement, fire protection, and include a thistle maintenance program. The GHAD would also handle any emergency response with landslides or erosion affecting any of the improvements. A scheduled preventative maintenance program was intended to prevent such occurrences, but if such events occurred, repairs would be made and a reserve was in place to handle potentially larger events. The budget was robust to ensure that work could be done.

- The Plan of Control included two scheduled monitoring events with the entire site to be walked, mapped, and any maintenance recommendations identified. In the event of heavy rainfall events, as an example, the area would be monitored to ensure all improvements functioned well. The scheduled, preventative, and emergency responses were again all highlighted as detailed in the Plan of Control. Scheduled maintenance had been budgeted for twice a year (spring/fall) with a contingency for any heavy rainfall events. Monitoring was typically done by an engineer or a trained and certified Engineering Geologist.
- For GHAD-owned parcels, the GHAD would be responsible for fencing and would be part of the walk-through events with the developer as either in-compliance or deficient at the moment. Grazing management and trails on GHAD-owned parcels would also be the GHAD responsibility. PG&E power lines and towers that may be located on GHAD-owned property would not be part of GHAD maintenance responsibilities.
- Staff was unaware of GHADs being taken over/managed by a land trust but were aware of some agencies considering taking over their GHAD and moving them in-house to the agency.
- ENGEO is the GHAD Manager for the Orinda GHAD which encompassed Wilder and Orinda Oaks. As with the Moraga GHAD, ENGEO had been involved in the grading on the site as the engineer, with a third-party review, and the County review geologist had been involved in the transfer process which had been working well.

Mr. Harrell stated ENGEO had been asked to review the February 3, 2021 staff report for this item and he found the conclusions in the staff report had not represented ENGEO's opinions. He wanted to provide additional information to the GHAD Board to clarify errors in the staff report based on additional information that was available.

**Chair McCluer** confirmed Mr. Harrell had contacted him and wanted to present additional information. He suggested Mr. Harrell be offered the opportunity to share that information for discussion.

Mr. Harrell described the transfer process as identified in the Plan of Control, where the developer was responsible for all GHAD duties up until the time of transfer. For a minimum of three years a developer was required to hold a development and all the liability associated with it so that the GHAD may build up a minimum amount of funds before taking ownership of land and the GHAD responsibilities.

Public Works Director/Town Engineer Shawn Knapp reported he had spoken with the Acting City Manager and City Engineer for the City of Orinda about Orinda's GHAD (consisting of two subdivisions). Until a few years ago, ENGEO, along with Watermark Asset Management (acting as the Orinda GHAD Treasurer), had performed most of the GHAD activities. The City of Orinda had gone through some analysis through discussions with property owners who had questions about operations and funding and trying to separate the acceptance, review and creation of the different activities to relieve the perception of a conflict of interest. ENGEO no longer performed all of the activities it had in the past, and Town staff believed the Moraga GHAD should consider

looking into separating different roles and policies so there would be no perception of conflict with a consultant working for both the developer and the agency.

Mr. Knapp reported current Public Works and Engineering staff had been trying to shepherd the acceptance of the subdivisions and annex them into the Moraga GHAD but it appeared some things had not been taken care of or had been deferred. As soon as the Bellavista development was accepted, things must be in place to handle it in one direction or another. He acknowledged there were different styles of management and levels of liability associated. Staff was trying to provide the information found as part of its research to support any decisions to be made by the GHAD Board when moving forward.

In response to the Chair, Mr. Colantuono understood the Town was a member of a risk pool which provided risk management advice for the Town, which could provide risk management strategies. In this case, he recommended the GHAD Board consider the practical risks for management and whether there was a particular landslide that was a concern for activating or a slope failing. He offered different scenarios of potential allegations of causation, and suggested the GHAD Board consider the practical risks it was managing, who the claimants were, and theories and facts that could involve the Town. He suggested the GHAD Board should consider three competing and equally important values including risk management, transparency public confidence and efficiency.

Responding to the GHAD Board, Ms. Battenberg shared concerns with staff capacity. In terms of the GHAD management structure, if the GHAD Manager just managed and contracted out for the various services and then moved the process forward through the GHAD Board for decisions using experts, she did not envision the use of in-house staff for maintenance or design. However, the challenge was Town staff was already involved in quite a bit in the acceptance, was entwined in the process, and the question was for the Public Works Director to address the issue of acceptance, inspections and the more technical work.

Mr. Knapp acknowledged that with new Town staff coming on board in recent years they had had to complete some of the projects as the developer was bringing them forward and some were complicated, which involved the need for other consultants to work with Town staff. Town staff had to reach out to ENGEIO to work with the Town at times to determine how the sites, developments, and GHAD properties were ready to be accepted by the Town, and in turn annexed into the GHAD; however, staff had not had a successful relationship with that process. Staff had been pulled into doing more heavy lifting than hoped since these involved GHAD-owned properties in the GHAD. While ENGEIO had a dual role, was being paid by the developer and the Town, there had been no cross over, at least from the Town engineering staff which was disappointing, and Town staff was struggling to get up to speed.

Mr. Knapp commented that the acceptance of the Bellavista Subdivision would be considered by the Town Council at a future meeting. The development involved multiple GHADs and during construction there had been a major landslide that had to be remediated. As part of that Town staff had looked to the GHAD Manager for assistance to process and manage the acceptance, which relationship had never taken off creating a difficult situation. Staff would be doing what it was already doing, were comfortable doing so, but it would be an added workload as the Town Manager had stated and staff had limited capacity.

Mr. Harrell explained that ENGEIO's job as the GHAD Manager, as with other GHADs, was to serve the GHAD Board and when the GHAD Board provided direction to take that direction. He had spoken with the GHAD Board Chair prior to the meeting given the desire to help the GHAD Board make good decisions and provide information. He suggested the staff report was incomplete and inaccurate in many cases and did not allow for a good decision-making process.

Mr. Harrell stated that ENGEO was willing to work with Town staff. ENGEO had worked with and managed Contra Costa County's GHADs for years, as well as with the City of Oakland. While neither Contra Costa County nor the City of Oakland had responded to the survey, ENGEO was closely involved in their GHADS and ENGEO was a resource for the Town.

Mr. Harrell stated he also had a number of telephone calls with the Town's Senior Civil Engineer and another member of the engineering staff and would continue those conversations as needed. He clarified that ENGEO did not accept anything through the GHAD until the Town had accepted the development since the GHAD was an inheritor agency. ENGEO wanted to ensure what the GHAD accepted had been constructed properly and had been well maintained. Communications with all Town staff had been a result of that process.

Mr. Harrell cited the City of Hayward GHAD, which ENGEO managed, and noted in that case the City of Hayward had accepted the grading permit although ENGEO had not. He referenced a letter he had received from the City of Hayward's Associate Engineer and read the last sentence of that letter in the record where the Associate Engineer had stated he would trust ENGEO's judgment considering its extensive technical background and experience in managing other districts. He noted that ENGEO had a relationship with the City of Hayward as it had with other town/cities/counties when going through the acceptance process. He stated that additional information could be provided for Contra Costa County's six GHADs which involved 17 developments or the City of Oakland's two GHADs which involved three developments. He left it to the GHAD Board as to how and if it wanted that additional information.

**Boardmember Sos** recognized that ENGEO had the experience and resources to do the work and there was a lot that was desirable about creating that separation and having ENGEO handle the GHAD Manager role, although as noted in the staff report and in the survey, there may not be the customer service experience people wanted through that process. Whatever the GHAD Board decided it should maximize the benefit to the Moraga community as a whole. She asked whether there was a path forward to address the customer service issues to determine the best route for the community.

Mr. Harrell explained that ENGEO had been managing GHADs for 16 years, had not been removed from any GHAD Manager position during that time, and ENGEO had been very responsive. He again respectfully disagreed with the conclusions in the staff report. He added the City of Dublin had recently brought ENGEO on for another five years of service for a GHAD contract and cited the overwhelmingly positive experiences in that situation. He emphasized that ENGEO had experience serving GHADs well and being re-appointed, re-hired and continued in all of the GHADs ENGEO managed.

Mr. Colantuono described the process of accepting an asset when there were two different roles: one, the role of a land use regulator confirming compliance with the conditions of approval of a project, an appropriate role for the Town with the Town having a robust statutory immunity from any liability arising from that function; and two, the role to own, operate and control an asset and when accepting something into its own pool of assets, it would be inspected with a decision made whether or not to accept it. That was a simultaneous function when serving as the planning agency and the ultimate owning agency but there were two separate roles involved. The reason a GHAD would not accept title and responsibility and liability until after the land use regulator had accepted it, was because they had the protection that the developer had been held to the developer's duty and another licensed professional which would own the asset.

Mr. Colantuono suggested the Town Attorney be asked to consider whether it was appropriate and necessary for the Town to own real estate assets within the GHAD in that it may be in the Town's interest to transfer that title to the GHAD possibly subject to an easement or some sort of

a reservation of the rights where the Town had the utility of the asset it wanted for the public and for the Town but did not have the responsibility of owning the asset.

In response to Boardmember Onoda, Mr. Knapp clarified the survey was not about ENGE0 but the structure of other agencies. ENGE0 could be the choice to be the GHAD Manager or some other entity, and he acknowledged ENGE0 had the experience and customer loyalty. Staff was not suggesting otherwise but there had been difficulties with the administration aspect of the process. Staff was not desirous to be the inspectors or the special engineer conducting the inspections. In the event of a landslide in the area, ENGE0 or some other company would be hired to determine the remedial repair since it was outside the current capacity of Town staff. He emphasized it was a staff workload issue that staff had not previously anticipated.

**Vice Chair Woehleke** asked for guidance from the GHAD Attorney whatever the path chosen whether any configuration would be restricted from being modified.

Mr. Colantuono advised that as long as the Town Council remained the GHAD Board, it may adapt its staffing decisions as it sees fit and what best fit the needs of the Town and the GHAD. Based on the discussion, he suggested the GHAD Board may request a further staff report at a subsequent meeting specifically describing the tasks that staff would provide and ask for specific input as to who would do it, identify the costs, needs of capacity and the risk management implications. He commented that the project management function as he had heard it described by the Town Manager did not strike him as likely to involve sins of omission and the GHAD would likely not be sued for something a GHAD Manager did, but what they failed to do, and there needed to be management and documentation that there were no sins of omission being committed. If the GHAD did its acceptance in the capacity of land use regulator it would be very well protected. What the GHAD owned and managed as an asset as a land owner would become an issue and the GHAD Board should give more thought, with input from the Town Attorney, about who should hold title to those assets.

Mr. Colantuono suggested the GHAD Board ask staff to bring the item back with less information, on a deeper and narrower subject, such as, what specific tasks the team could be expected to handle along with the business and liability consequences of those tasks.

Ms. Battenberg suggested staff could explore what responsibilities or duties made sense on an efficiency basis for the Town to handle, discuss whether the Town should serve as the consultant to the GHAD, and whether staff could handle some of the administrative tasks, or alternatively if the Town was the GHAD Manager what it would do and what would have to be contracted out. Staff could go deeper into those details and based on that the GHAD Board could request a risk assessment.

**Boardmember Stromberg** asked the GHAD Attorney to opine on the concerns with actual and perceived conflict of interests if the GHAD Manager also served as the GHAD Engineer and represented the developers.

Mr. Colantuono explained that the GHAD Manager was a public official subject to the Political Reform Act and Government Code Section 1090 of the Common Law Conflicts of Interest and had to identify their sources of income and abstain from decisions that would have a material financial effect on their sources of income. If they received more than their threshold amount of income from the developer within 12 months of a decision, and the decision they were asked to make had a material financial impact on the developer, they would have to abstain from making a decision as would be true of the Public Works Director. In this case, he found they were not discussing legal conflicts but perceived conflicts that the public may not have confidence that the advice they were being given about how to conduct risk management in the practical sense, was free and fair and aboveboard if this person was also in the business of working for developers.

Mr. Colantuono found they were speaking of a hybrid relationship. Town staff had not indicated a willingness or capacity to do all of the things that ENGEO proposed to do and there would be a division of responsibilities between them. If that was the case, he suggested the broader title be given to the liability component and the specific title be given to the Town.

#### PUBLIC COMMENTS OPENED

**Chair McCluer** reported no comments had been received for this item.

#### PUBLIC COMMENTS CLOSED

**Chair McCluer** declared a recess at 7:40 p.m. The Special GHAD Board meeting reconvened at 7:45 p.m. with all GHAD Boardmembers and staff present via Zoom.

**Chair McCluer** suggested it made sense to ask the Town Manager to scope out in more detail the exact structure of roles and tie in as much as possible the risk management feature.

Ms. Battenberg asked if the GHAD Board would consider what tasks made the most sense for the Town to do without saying it would do it as the GHAD Manager and then figure out how it all fit in. Staff would consult with the GHAD Attorney on the level of risk and provide that information to the GHAD Board. The GHAD Board should request a follow-up special project from Town staff consistent with their agreement.

**Boardmember Sos** also wanted to hear some thoughts from legal counsel on who should own the land, whether the GHAD or the Town, which would inform other things. She liked the way that Mr. Colantuono had described it and the notion of ENGEO having the broader role and the Town having a surgical role made sense given the liability, capacity and expertise issues.

Mr. Harrell explained as it had been set up currently, and through the Plan of Control, the open space parcels would be GHAD owned. When asked, he clarified there were no real estate assets in the GHAD to be held in title by the Town.

**Vice Chair Woehleke** wanted assurance the input to staff would allow staff to return with information for an informed decision. He wanted to see two or more organizational or functional charts which described more than one option. Other than the two current options under discussion, he wanted to see whether to continue as they were or whether the Town should take on more responsibilities. He suggested a third option could be whether a trust should take over responsibility. He noted the issue under discussion was potentially a significant change to that envisioned years ago and there should be a test as to whether the decisions of the past were still valid. He pointed out that trusts owned land and managed open space successfully. He found that the management of the GHAD was not in Town staff's normal and historical scope of responsibility and there was a concern with the drain on Town staff resources. He asked that the trust option be considered as another potential option.

**Boardmember Stromberg** asked who had been envisioned to be established as the trustee if the GHAD Board were to consider the third option offered by the Vice Chair, to which **Vice Chair Woehleke** suggested the trustee could be the John Muir Land Trust (JMLT).

Ms. Battenberg was uncertain the JMLT would have the expertise to manage the risks that existed within the GHAD. She suggested the GHAD Attorney made a good point that keeping the title of GHAD Manager with ENGEO would be helpful in terms of keeping an arms' length distance. She stated that staff, working with the understanding there were no job titles, and the responsibilities were handled with the contracts entered into, could start to flesh out more of ENGEO's



responsibilities and what was included in their contract since the GHAD Board had yet to enter into that contract. Similarly, something could be done for the Town which encompassed the clerk and other administrative and process-related services which could provide a good next step or structure.

Mr. Colantuono advised it would be prudent for the GHAD Board to end up with a contract between the Town and the GHAD specifically describing the Town's role.

Ms. Battenberg acknowledged that needed to be done since the clerk agreement only extended through June 30, 2021. As to the recommendation for a special project to direct staff to put together the tasks the Town should do as opposed to the tasks a third party such as ENGEIO should do, she suggested a lot of work should be done in partnership with ENGEIO since it would be the GHAD Manager, which would allow the GHAD Board to also move forward with a contract for GHAD Management Services.

**Boardmember Stromberg** agreed it was sound to involve ENGEIO in this discussion but in the process of working out those details he asked that the GHAD Attorney be involved to provide legal input as to how best to insulate the Town in connection with all GHAD-related functions.

**Boardmember Sos** agreed but suggested that analysis be undertaken once the GHAD management structure had been crystalized, and **Boardmember Stromberg** asked whether the GHAD management structure should be crystalized within the context of what made appropriate legal sense and at what point it would be most advantageous to have legal input elicited or provided by the GHAD Attorney.

Mr. Colantuono suggested it made sense for ENGEIO and Town staff to flesh out their thinking and once gelled, but not completely set, he would review it. Also a contract would be prepared by the Town Attorney and that input would be helpful.

**Chair McCluer** summarized the consensus of the GHAD Board in the form of a special project that staff be directed to identify the tasks the Town should do and what the third party (ENGEIO) should do as the GHAD Manager and return from a task perspective with review by the GHAD Attorney. He was confident the Town Manager would utilize her full staff on this item.

As to when to return to the GHAD Board with the additional information, Ms. Battenberg recognized time was of the essence due to the Bellavista Subdivision acceptance. She suggested staff could return in the next month or two.

## **6. GHAD BOARD REQUESTS FOR FUTURE AGENDA ITEMS**

There were no requests for future agenda items.

## **7. COMMUNICATIONS**

There were no communications.

## **8. ADJOURNMENT**

**ACTION: It was M/S (Woehleke/McCluer) to adjourn the GHAD Board meeting at 8:02 p.m.  
Roll Call Vote: 5-0.**

Respectfully submitted by:

  
\_\_\_\_\_  
Marty C. McInturf, GHAD Clerk

Approved by the GHAD Board of Directors:

  
\_\_\_\_\_  
Mike McCluer, GHAD Chair